

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Promoting Efficient Use of Spectrum) WT Docket 00-230
Through Elimination of Barriers)
to the Development of Secondary)
Markets)

To: The Commission

**Comments of the Rural Cellular Association and
Request for Further Notice of Proposed Rulemaking**

The Rural Cellular Association ("RCA"),¹ by its attorneys, hereby submits comments and a request for a Further Notice of Proposed Rulemaking in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding in which the Commission examines actions that it might take to remove regulatory barriers to the development of a more robust secondary markets in radio spectrum usage rights.²

RCA is encouraged by the Commission's recognition that in rural areas, spectrum-based services are often not fully deployed and consumers are often underserved. RCA is concerned,

¹ RCA is an association representing the interests of small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. Formed in 1993 initially to address the distinctive issues facing rural cellular service providers, the membership of RCA is concerned with advancing policies that foster the implementation of wireless services in the nation's rural and smaller market areas.

² *Notice of Proposed Rulemaking*, WT Docket 00-230, FCC 00-402 (rel. Nov. 27, 2000) ("NPRM").

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however, that the Commission has primarily focused on the adoption of rules to permit spectrum leasing. While the option of spectrum leasing should be adopted, the Commission should not ignore the fact that spectrum leasing, alone, will not provide a sufficient mechanism to foster the utilization of spectrum in smaller markets and rural service areas.

The NPRM identifies and recognizes many of the problems that will attend spectrum leasing. The NPRM, however, does not adequately address the issue of whether spectrum leasing could provide an adequate panacea to the real public policy issue: unused and underused spectrum held by large corporate licensees who will have no obligation to lease unused spectrum unless they find the terms and conditions of a lease satisfactory.

Spectrum leasing, in the absence of the adoption of additional meaningful rule changes, relinquishes to the licensee the decision of whether or not unused spectrum will remain fallow. This result is contrary to both the public interest and past Commission practice.

While the option of spectrum leasing should be adopted, the Commission must not adopt the conclusion that this action, alone, will address the public interest concerns identified by the NPRM. Ironically, the Commission has long had pending before it a proposal that could quickly and efficiently promote the provision of wireless services in rural and small market areas utilizing unused A and B Block PCS spectrum: the adoption of a “fill-in” policy similar to that in place with respect to cellular licenses.³ Adoption of a fill-in policy for the PCS A and B blocks should be implemented in conjunction with action to promote the dissemination of licenses to the Designated Entities. Where large entrepreneurial entities have acquired licenses and left large

³ See 47 C.F.R. §22.949.

areas underserved and spectrum underutilized, meaningful opportunities for Designated Entities to provide service should be fostered both to implement the Congressional mandate and to truly serve the public interest.

I. The Commission Should Promote the Deployment of Fallow Spectrum In Rural And Smaller Market Areas

In its NPRM, the Commission recognizes that “particularly in rural areas, spectrum-based services are often not fully deployed and consumers are often underserved.” The NPRM notes one of the ways to address this problem is to have more “intensive use of spectrum that is already licensed but is underutilized or inefficiently utilized.”⁴ RCA commends the Commission for focusing its attention on the delivery of services where a licensee has not deployed facilities. Large companies have enjoyed the benefits of both the Commission’s spectrum auction processes and the minimal build-out requirements which enable the licensee to focus attention and capital resources on the most lucrative parts of its license area. Attention is clearly warranted to the consideration and adoption of policies to foster the utilization of the fallow spectrum by other entities and, particularly by Designated Entities.

A review of the current status of the deployment of the 60 MHz of spectrum that was licensed to A and B Block PCS auction winners over five years ago illustrates the need for the Commission to meaningfully address this underutilization of spectrum in smaller and rural markets. According to the Commission’s build-out information of A and B Block PCS Licensees posted on the its webpage, approximately only 14 percent of the BTAs within the A and B Block

⁴ NPRM at paras. 7&8.

license areas are served.⁵ Because Commission rules require only that these licensees make their services available to one-third of the population in their service area within five years and two-thirds of the population within ten years, it is very likely that large portions of the license areas may never be served by the A and B Block licensees. Accordingly, in rural markets where only a small percentage of the population resides, it is very likely that there will be 60 MHz of spectrum that remains fallow unless the Commission takes meaningful action.

II. Spectrum Leasing Alone will not Achieve the Commission's Goals of Better Utilizing Fallow Spectrum in Rural and Smaller Markets.

RCA agrees that spectrum leasing may be a valuable tool to foster better utilization of spectrum and urges the Commission to adopt rules that permit this option. Spectrum leasing alone, however, is not sufficient. An additional and meaningful alternative should be adopted: a fill-in policy designed both to promote the utilization of spectrum in small and rural markets and the dissemination of licenses to Designated Entities while concurrently protecting the legitimate interests of the PCS A and B block licensees.

A. Spectrum Leasing Alone Will Not Sufficiently Encourage Build Out of Facilities in Small and Rural Markets.

In its NPRM, the Commission asks whether potential spectrum lessees would be willing to build out facilities if they would be leasing the rights to use spectrum for only a short period of

⁵ The Commission's build-out schedule is found at www.fcc.gov/wtb/pcs and was last updated on February 2, 2001. The schedule lists each A or B Block licensee, the technology that the licensee has chosen and indicates on a BTA-basis, whether service is available and operational. Of the 2811 full, partitioned or disaggregated BTAs shown, only 381 are reported as being on-line.

time.⁶ In the context of small and rural markets and services provided by Designated Entities, the answer is obviously no.

How could Designated Entities, or any carrier invest in deploying the facilities necessary to provide service to less populated areas in the absence of an expectancy that they could continue to provide service over the entire period of time required to recoup build-out costs? The “pay-back” period is likely to be much longer in rural and small markets due to the smaller subscriber base and other geographical and demographic characteristics associated with these market areas (e.g., smaller population density, difficult to serve terrain) in comparison to larger urban areas. Were this not the case, the licensee would not likely leave the spectrum fallow.

Designated Entities that would rise to the challenge of serving these otherwise underserved areas will require a level of assurance that they will have rights to the spectrum on a long term basis under terms and conditions that do not inherently dictate failure. Lease arrangements under which the spectrum is returned to the “lessor” (i.e., the Licensee) after the lease term will hardly provide this necessary level of assurance. In fact, the fostering of these conditions could lead to a perverse result. If Designated Entities and other potential carriers are enticed to lease spectrum and succeed in creating a viable business, they risk exposure to the landlord either imposing oppressive terms to renew the lease or a lessor who refuses to renew the lease, and, instead, takes over the lessee’s business at the end of the lease.⁷

⁶ NPRM at para. 23.

⁷ In contrast, carriers that receive a license either directly from the Commission or from another carrier through partitioning or disaggregation have a renewal expectancy.

B. The Necessary Conditions and Burdens of Spectrum Leasing May Discourage the Utilization of Fallow Spectrum.

Throughout the NPRM, the Commission raises issues that demonstrate that spectrum leasing would be burdensome for both lessors and lessees. If the licensee has the ultimate responsibility for ensuring compliance as the Commission has proposed,⁸ it would have to monitor the lessee to ensure that it complies with all interference, technical and service rules and obtain appropriate approvals or authorizations. The Commission recognized that this may place a “significant administrative burden” on the licensee/lessor.⁹ Inevitably, this burden will be measured by financial cost which will be borne by the lessee. Both lessors and lessees would be additionally burdened by the cost of negotiating extensive contractual provisions.¹⁰

RCA is especially concerned that if spectrum leasing is the only option adopted by the Commission, the recognized burdens associated with leasing will ultimately result in disincentives for carriers to enter into leasing arrangements. If the Commission concludes that it has fully addressed the problems of fallow spectrum on the A and B blocks and the needs of Designated entities by only adopting the spectrum leasing option, the public will truly be poorly served. Instead, RCA urges the Commission to also adopt a meaningful fill-in policy applicable to the unused spectrum. A properly crafted policy will not only result in the dissemination of licenses to Designated Entities to serve underserved areas; the fill-in policy may also serve to encourage

⁸ NPRM at para. 29.

⁹ NPRM at para. 40.

¹⁰ See NPRM at n.48 (Commission noting provisions that are required to be included in contracts negotiated with 700 MHz “Guard Band” licensees and noting additional provisions that might also be required).

licensees to utilize the spectrum leasing option to counter a “use it or lose it” alternative. The existing “use it when you want to” policy provides no impetus to the licensee to offer a potential lessee fair and equitable terms pursuant to which the lessee could develop a successful service business. The administrative burdens inevitably associated with spectrum leasing add to the likelihood that meaningful leasing opportunities will not exist in the absence of a meaningful fill-in policy.

C. Spectrum Leasing Will Not Achieve the Commission’s Statutory Mandate to Disseminate Licenses to Designated Entities.

In response to Congress’ directive that the Commission design its competitive bidding regulations to “promot[e] economic opportunity and competition . . . by . . . disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,”¹¹ the Commission initially established the C and F Blocks as set-asides for small businesses and other designated entities to become licensees of PCS spectrum. Now that the re-auction of C and F Block spectrum has been completed, it is unequivocal that PCS spectrum is not disseminated among small businesses, rural telephone companies and businesses owned by minorities and women and that the Congressional mandate has not been achieved.¹² Although spectrum leasing may create a

¹¹ 47 U.S.C. § 309(j)(3)(B).

¹² See “Auction Fails to Open Airwaves,” *Washington Post* Jan. 23, 2001 (noting that at the end of the PCS C and F Block auction “the nation’s biggest mobile phone companies are sharing virtually all of the bounty - even slices of the skies that were reserved for start-up ventures”). In previous filings, RCA has urged the Commission to initiate an inquiry to rectify the harm caused to Small Businesses and other Designated Entities as a result of the failure of its rules and practices with respect to PCS spectrum opportunities. See, e.g., RCA’s Comments filed on June 22, 2000 in response to the FCC’s Further Notice of Proposed Rulemaking in WT

limited opportunity for small businesses and other designated entities to participate in the provision of wireless services, this option alone will not satisfy the Congressional mandate. As addressed by the NPRM, and discussed above, leasing offers an opportunity that is ultimately limited and defined by the licensee in the terms and conditions of the lease. Accordingly, the Commission should utilize the opportunity framed by this proceeding, together with its pronounced concerns with respect to promoting the efficient utilization of spectrum in small and rural market areas, to create meaningful opportunities for Designated Entities to obtain PCS spectrum licenses.

III. To Achieve the Commission's Goals of Deployment of Fallow Spectrum In Rural and Smaller Market Areas, the Commission Should Issue a Further Notice to Consider the Adoption of a Fill-In Policy for A and B Block PCS Spectrum Licenses.

During the formulation stages of the Commission's rulemaking regarding PCS and more recently in the context of the PCS C and F Block re-auction,¹³ RCA proposed opening the A and B spectrum Blocks to expedited fill-in applications where spectrum remains unused. While this proposal is consistent both with past Commission practice and enunciated Commission goals and objectives, the proposal has heretofore been ignored. Accordingly, RCA respectfully requests that the Commission issue a Further Notice of Proposed Rulemaking to consider and adopt this proposal which would provide a substantive, equitable, and efficient opportunity to foster service to the public residing in unserved and underserved rural and small markets within the service

Docket No. 97-82.

¹³ See RCA's Comments filed on June 22, 2000 and Reply Comments filed on June 30, 2000 in response to the FCC's Further Notice of Proposed Rulemaking in WT Docket No. 97-82.

areas of A and B Block licensees.

Specifically, RCA has proposed that the Commission adopt rules to promote the provision of service in unserved areas on A and B block spectrum, on a mutually exclusive basis, by qualified Designated Entities. The proposal incorporates protection of the rights of existing licensees by providing an opportunity for the existing licensee to seek denial of the fill-in application on the basis of its demonstration that it will cover the designated area on as timely a basis as that provided by the fill-in proposal. The adoption of this proposal will achieve the Commission's goals of deploying fallow spectrum in rural and small market areas while concurrently providing meaningful opportunities for Designated Entities. Subsequent to the adoption of this proposal, the Commission can monitor the utilization of this newly created fill-in opportunity to determine whether a similar policy should be expanded to other PCS spectrum blocks as well as to other spectrum licenses.

IV. Conclusion

RCA is encouraged by the Commission's concern regarding the utilization of unused spectrum in the nation's smaller and rural markets, and urges the Commission to permit the option of spectrum leasing. Spectrum leasing alone, however, will not meaningfully promote the build-out of facilities to utilize unused spectrum in small and rural markets. Nor will spectrum leasing achieve the mandate that the Commission provide meaningful opportunities for the dissemination of licenses to Designated Entities. The Commission may optimize the opportunity presented by this proceeding to give meaningful consideration to additional rule changes which will more effectively and expediently achieve the public interest objectives which have long been recognized, but have equally long gone unfulfilled by existing Commission policies.

Accordingly, RCA respectfully requests that the Commission issue a Further Notice of Proposed Rulemaking to specifically address and consider the establishment of a fill-in policy with respect to the A and B Block PCS licenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of the Rural Cellular Association" was served on this 9th day of February 2001, via hand delivery to the following parties:


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